SARAWAK SHELL BHD

v.

PPES OIL & GAS SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: Q-02-501-1996]
13 NOVEMBER 1997

ARBITRATION: *Agreement - Jurisdiction of court - Whether s. 34(1) of Arbitration Act 1952 deprives court of power to make orders under s. 25(2) of the Act - Whether s. 34(1) confined to "any arbitration held" under the Arbitration Rules - Definition of "held" - Time when s. 34(1) becomes operative - Whether court could exercise supervisory powers under the common law or its inherent jurisdiction*

ARBITRATION: *Agreement - Jurisdiction of court - Whether court will exercise its powers under s. 25(2) of the Arbitration Act 1952 when fraud alleged - Effect of s. 34(1) of the Act*

WORDS & PHRASES: *"Any arbitration held" - Section 34(1) Arbitration Act 1952*

This was an appeal against the decision of the trial judge who held that s. 34(1) of the Arbitration Act 1952 ('the Act') prohibited any reference to s. 25(2) of the Act.

The parties had entered into a contract whereby all disputes connected with the contract was to be conducted by arbitrators under the Arbitration Rules ('the Rules') and not the court. On 15 March 1996, the respondents had written to the appellant concerning the valuation of the contract in which they accused the appellant of conspiring with their subcontractors to take over works awarded to the joint venture. The appellant denied the allegations claiming such remarks were defamatory and insisted the remarks be withdrawn. The respondents persisted and in their letter of 14 May 1996, stated that if the appellant insisted on maintaining their stand the respondents would pursue the point in arbitration. On 24 May 1996, the respondents served a written notice with points of claim on the appellant in accordance with the Rules and thereafter appointed an arbitrator. The Director of the Regional Centre for Arbitration ('the Director') was informed and the initial payment was duly

made. On 25 June 1996, the director informed the appellant that the appointment of their arbitrator was due. By that stage there was no question that the arbitration had commenced.

The appellant sought to stymie the arbitration proceedings commenced by the respondents by filing an originating summons on 26 June 1996 praying that the court exercise its powers under s. 25(2) of the Act. Counsel for the appellant contended that s. 34(1) could only apply to "any arbitration **held**" under the Rules. He asserted that the arbitration had not quite got off the ground and could not therefore be regarded as an arbitration "held" under the Rules. The implication was that it was only upon the **conclusion** of the arbitration that s. 34(1) would become operative so as to make the rest of the Act inapplicable except s. 34(2) of the Act. The originating summons was later amended to include a claim that the court also had jurisdiction at common law or an inherent jurisdiction to make the orders sought. The appellant asserted that since the respondents had accused it of fraud, the trial judge was obliged to exercise his powers thereunder.

Held:
Per Mahadev Shankar JCA

[1] Taking the plain meaning of the words the court was in complete agreement with the trial judge that the effect of s. 34(1) was to exclude altogether not just s. 25(2) but the entire Act and all other written law from an arbitration held under the Rules.

[2] In the context of the section, and as to the word "held", all that is needed to ask is whether there is an arbitration in existence. This is the case as soon as the notice of arbitration is received by the party against whom the arbitration has been initiated.

[3] The claim that the court had powers to intercede here by virtue of its inherent jurisdiction or at common law was based on *dicta* cited from *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 and *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1997] 1 CLJ 665. These decisions were irrelevant because they concerned the power of judicial review over the decision of the Industrial Court in the first case, and the Minister's decision pursuant to the exercise of his statutory powers in the second. In each case the jurisdiction of the Industrial Court and the Minister over the employer was "compulsory whereas the jurisdiction of the arbitrator over both parties to an arbitration agreement was consensual only."

[4] There is a power under s. 25(2) of the Act but the court will not exercise that power merely because one party makes a bare allegation of fraud. Had there been no s. 34(1) to come to the aid of the respondents, this court would still have held that this application was misconceived because there was nothing in the respondents' letters which amounted to any concrete or specific charge of fraud such as to come within the purview of s. 25(2) of the Act.

[Appeal dismissed with costs to the respondents.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini adalah rayuan terhadap keputusan hakim perbicaraan yang memutuskan bahawa s. 34(1) Akta Timbangtara 1952 ('Akta tersebut') tidak membenarkan apa-apa rujukan kepada s. 25(2) Akta tersebut.

Kedua-dua pihak telah memasuki satu kontrak di mana dipersetujui bahawa semua perbalahan berkenaan dengan kontrak tersebut akan dikendalikan oleh penimbangtara di bawah Kaedah-kaedah Timbangtara ('Kaedah tersebut') dan bukan mahkamah. Pada 15 Mac 1996, responden telah menulis kepada perayu mengenai penilaian kontrak tersebut dan menuduh perayu berkomplot dengan subkontraktor untuk mengambilalih kerja-kerja yang telah diawadkan kepada perjanjian bersama (joint venture). Perayu telah menafikan tuduhan tersebut dan menegaskan bahawa tuduhan itu merupakan penyindiran dan mesti ditarik balik. Tetapi responden telah berterusan dan di dalam surat mereka bertarikh 14 Mei 1996, mengatakan bahawa jika perayu masih berpegang kepada pendiriannya maka responden akan mengejar perkara ini melalui timbangtara. Pada 24 Mei 1996, responden telah menyerahkan sesalinan notis bertulis dengan tuntutannya pada perayu menurut Kaedah tersebut dan selepas itu melantik penimbangtaranya. Pengarah Regional Centre for Arbitration ('Pengarah tersebut') telah diberitahu dan pembayaran pendahuluan telah dibuat. Pada 25 Jun 1996, pengarah tersebut telah memberitahu perayu bahawa perlantikan penimbangtaranya diperlukan. Setakat itu tiada soalan bahawa timbangtara telah bermula.

Perayu telah cuba menghalang prosiding timbangtara yang telah dimulakan oleh responden dengan memfailkan saman pemula pada 26 Jun 1996 memohon supaya mahkamah menggunakan kuasanya di bawah s. 25(2) Akta tersebut. Peguambela perayu menghujah bahawa s. 34(1) hanya boleh terpakai kepada "any arbitration held" di bawah Kaedah tersebut. Implikasinya adalah bahawa ianya hanya pada penghabisan timbangtara yang s. 34(1) akan beroperasi untuk menyebabkan bahagian-bahagian lain Akta tidak terpakai kecuali s. 34(2) Akta tersebut. Saman pemula tersebut kemudiannya dipinda untuk memasukkan tuntutan bahawa mahkamah juga mempunyai bidangkuasa di bawah undang-

undang asasi (common law) atau bidangkuasa asal (inherent jurisdiction) untuk membuat perintah yang dipohon. Perayu telah mengatakan bahawa oleh kerana responden telah membuat tuduhan fraud, hakim perbicaraan patut menggunakan kuasanya yang sedia ada.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Dengan memakai maksud biasa perkataannya mahkamah bersetuju dengan hakim perbicaraan bahawa kesan s. 34(1) adalah untuk menolak bukan sahaja s. 25(2) tetapi keseluruhan Akta dan semua undang-undang bertulis yang lain dari timbangtara yang ditetapkan di bawah Kaedah tersebut.

[2] Di dalam konteks seksyen tersebut, dan perkataan "held" (ditetapkan), yang diperlukan hanyalah untuk bertanya samada adanya suatu timbangtara yang sedia ada. Ini terjadi apabila satu notis timbangtara diterima oleh pihak terhadap mana timbangtara itu ditujui.

[3] Tuntutan bahawa mahkamah mempunyai kuasa untuk campurtangan kerana undang-undang asasi atau bidangkuasa asalnya adalah berdasarkan dicta yang dinyatakan di dalam kes *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 and *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1997] 1 CLJ 665. Keputusan-keputusan ini tidak terpakai kerana ia berkenaan kuasa "judicial review" ke atas keputusan Mahkamah Perusahaan di dalam kes pertama, dan keputusan Menteri di bawah kuasa statutorinya di dalam kes kedua. Di dalam setiap kes bidangkuasa Mahkamah Perusahaan dan Menteri ke atas seorang majikan adalah "compulsory whereas the jurisdiction of the arbitrator over both the parties to an arbitration agreement is consensual only" (diwajipkan manakala bidangkuasa penimbangtara ke atas kedua-dua pihak kepada sesuatu perjanjian timbangtara adalah mengikut persetujuan sahaja).

[4] Terdapat kuasa di bawah s. 25(2) Akta tersebut tetapi mahkamah tidak akan memakainya hanya kerana satu pihak membuat tuduhan fraud sahaja. Walaupun tiada s. 34(1) Akta tersebut untuk membantu responden, mahkamah masih akan memutuskan bahawa permohonan ini adalah salah (misconceived) kerana tiada apa-apa di dalam surat-surat responden yang dinyatakan menimbulkan sebarang bukti atau tuduhan spesifik fraud yang boleh masuk di dalam bidang s. 25(2) Akta tersebut.

[Rayuan ditolak dengan kos kepada responden.]

Cases referred to:
Bremer Vulcan v. South India [1981] 1 LILR 253 ***(foll)***
Camilla Cotton v. Oil Granadex SA And Tracomin [1976] 2 Llyod's Rep 10 ***(cit)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 ***(dist)***
Klockner Industries-Anlagen GmbH v. Kien Tat Sdn Bhd & Anor [1990] 3 MLJ 183 ***(foll)***
Lai Siew Wah Sdn Bhd v. Ng Chai [1988] 1 CLJ 603 ***(cit)***
Malaysian Government Officers Co-operative Society Ltd v. VAI Ltd & Ors [1972] 1 MLJ 113 ***(cit)***
Soilchem Sdn Bhd v. Standard-Elektrik Lorenz AG [1993] 3 MLJ 68 ***(foll)***
Sykt Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(dist)***
Watson v. Prager [1991] 3 All ER 487 ***(cit)***

Legislation referred to:
Arbitration Act 1952, ss. 25(2), 34(1), (2)
Arbitration Act 1979 [UK], s. 3(1)

Other sources referred to:
Halsbury's Laws of England, 4th edn, para 707
The Law and Practice of Commercial Arbitration, Mustill & Boyd, 2nd edn, p 116

For the appellant - Cecil Abraham (Robert Lazar & Jimmy Wee with him); M/s Jimmy HT Wee & Co
For the respondents - MS Sandhu (Victor Wong with him); M/s Victor Wong & Chew Advoc

[Appeal from High Court, Miri; Originating Summons No: MR(24)-24 of 1996]

Reported by Cindy Chan

JUDGMENT

Mahadev Shankar JCA:

Our decision to dismiss this appeal was unanimous. Its subject matter is of some importance to the independence and inviolability of arbitrations conducted in the Regional Centre for Arbitration at Kuala Lumpur (the Centre) under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Centre (the Rules).

In the court below Sarawak Shell Berhad (Shell) sought to stymie the arbitration proceedings commenced by the respondents by contending quite simply that s. 34(1) of the Arbitration Act 1952 (the Act) did not deprive the High Court of its power to make orders under s. 25(2) of the Act. Shell asserted that since the respondents had accused it of fraud the trial judge was obliged to exercise his powers aforesaid. In rejecting this claim the trial judge

held that s. 34(1) of the Act made any reference to s. 25(2) of the Act impermissible.

Before us Mr. Cecil Abraham of counsel for Shell sought to dilute the effect of s. 34(1) of the Act by submitting that it could only apply to "any arbitration held" under the Rules. In the present case he asserted that the arbitration had not quite got off the ground and could not therefore be regarded as an arbitration "held" under the Rules.

This point was not presented in that fashion in the court below. Nevertheless we permitted Mr. Abraham to proceed because we did not feel that the respondents would be in any way prejudiced and that the wider interests of the administration of justice made it desirable that we deal with this purported "refinement" of s. 34(1) of the Act once and for all.

The relevant contract was a very complex one which all parties had entered into at arms length. Clause 28(6) is set out here with the necessary emphasis:

> The COMPANY and the CONTRACTOR hereby agree that **any dispute** which may arise in connection with the activities contemplated in the CONTRACT on the application, **implementation**, validity, **breach** or termination of the CONTRACT or any provision thereof (whether resulting from a claim in contract, **tort** or **otherwise**) shall be finally and **exclusively** settled in accordance with the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules as applied by the Regional Centre of Arbitration at Kuala Lumpur, Malaysia. The place of arbitration shall be the Regional Centre for Commercial Arbitration, Kuala Lumpur. The number of arbiters shall be three (3) and the third arbitrator shall always be a suitably qualified and experienced lawyer.

The parties contracted to have **all** their disputes connected with the contract conducted not by a court but by arbitrators in accordance with the Rules.

The first shot was fired by the respondents by their letter to Shell dated the 15 March 1996. Its subject matter was a valuation of the contract. The last paragraph reads:

> The ratio of Preliminaries to that of Measured Works and additions is 31.7%, this is compared to 51.35% in our tender. The valuation without claims is RM308,188,408 therefore claims represents 11% of the Contract Value. Given the circumstances under which we fulfilled our obligations under the contract, the valuation being requested is fair and reasonable. You will note that we have excluded damages resulting from the company's conspiracy with our subcontractors, the loss of other contracts through the damage to our credibility and the detrimental relationship with our subcontractors due to delayed payment. We reserve our right to seek damages in the event that we are unable to reach an equitable and timely agreement on the attached valuation.

Shell denied the allegations of conspiracy by its letter dated 30th April 1996 claiming the remarks were defamatory and insisted they be withdrawn.

The respondents persisted by their letter dated 14 May 1996. The material portion reads:

> As the subject matter is in the points of claim in both the arbitration between PEF JV and SSB also between McConnell Dowell and PEF JV it would appear that one party or the other is in jeopardy of committing perjury. If the Company insists or standing by their letter SSB/PEF/3105 we will pursue this point in the arbitration. We advise the Company with all due respect to take the attached documents to their legal adviser prior to making any further statements on this matter. From the evidence in our hands it is quite clear that the Company's Engineering Manager Mr. F.A.C. Gray, did call a meeting with out subcontractor in late January 1995. That they did advise our subcontractor that they were going to issue a notice of termination on the Joint Venture. Also that they conspired with our subcontractor to take over the works awarded to the Joint Venture. It is also apparent that the Company was intimating that they would consider rewarding the subcontractor for their cooperation in this conspiracy.
>
> We put it to the Company to deny the evidence we have presented or to unconditionally withdraw their letter SSB/PEF/3105.

On 24 May 1996 the respondents served a written notice together with their points of claim on Shell. What they did was in accordance with the Rules.

Article 3 r. 2 states:

> 2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

In accordance with art. 7 the respondents appointed Mr. W.S.W. Davidson as their arbitrator on 27 May 1996. The director of the centre **(the director)** was notified the same on the same day. The centre requested the initial payment on 5 June 1996 and the respondents paid this on 12 June 1996. On 25 June 1996 the director wrote to Shell that the appointment of their arbitrator was due. On 26 June 1996 Shell's solicitors filed their Originating Summons in the High Court at Kuching invoking the court to make the orders Shell required under s. 25(2) of the Act.

By that stage there was no question that the arbitration had commenced. Indeed Mr. Abraham conceded this. What he wished us to imply was that it is only upon **conclusion** of the arbitration that s. 34(1) would become operative so as to make the rest of the Act inapplicable (except of course the enforcement provisions in s. 34(2) of the Act).

Far from diluting its effect this argument seeks to negate the section altogether. The clear words are:

> Notwithstanding anything to the contrary in this Act or in any other written law ... the provisions of this Act or other written law shall not apply to any arbitration held ... .

Thus the entire Act (except the enforcement provisions in s. 34(2)) has been excluded as well as all other statutory provisions. Such a construction is consistent with reality of the situation because the Rules constitute a comprehensive framework for the resolution of all disputes within their ambit.

We need to say something about *Klockner Industries-Anlagen GmbH v. Kien Tat Sdn. Bhd. & Anor* [1990] 3 MLJ 183 *("Klockner")* and *Soilchem Sdn. Bhd. v. Standard-Elektrik Lorenz AG* [1993] 3 MLJ 68 *("Soilchem").* Initially Shell relied solely on s. 25(2) of the Act. Subsequently the Originating Summons was amended to claim that the court also had jurisdiction at common law or an inherent jurisdiction to make the orders sought. In *Klockner*, YA Zakaria Yatim J (as he then was) held that s. 34 of the Act precluded the High Court from exercising its supervisory jurisdiction over arbitration proceedings at the centre. He said (at p. 185):

> It is clear that under the section, the court cannot exercise its supervisory function as provided in the Arbitration Act 1952, in respect of such arbitration. Neither can the court exercise its supervisory function over such arbitration under any written law. The words 'written law' has been defined in s. 3 of the Interpretation Act 1967, to mean the Federal Constitution and State Constitutions, Acts of Parliament and subsidiary legislation made thereunder; ordinances and enactments and subsidiary legislation made thereunder; and any other legislative enactments or legislative instruments. 'Written Law', therefore. includes the Companies Act 1965.

In *Klockner* the intervention of the court was sought in an ongoing arbitration. In *Soilchem* the award had been made. The applicant came to the High Court for *certiorari.* YA Abu Mansor J (as he then was) said at p. 72:

> In substance, Mr Pathmanathan submitted that s. 34(1) if the Arbitration Act 1952 does not oust the jurisdiction of the court to quash the decision of the arbitrator.
>
> After considering the submissions of both counsel, I am clear that the policy of the Arbitration Act 1952 was obviously to exclude cases that are before the Regional Centre for Arbitration at Kuala Lumpur. I have no doubt as to the purport and meaning of s. 34(1) of the Act. It was meant to exclude the jurisdiction of this court in such cases. I am clear on this and I apply the

decision of Zakaria Yatim in *Klockner Industries-Anlagen GmbH v. Kien Tat Sdn Bhd & Another* [1990] 3 MLJ 183 and I made the order in terms of prayer 1 with costs as prayed.

For the avoidance of doubt we now categorically say that these two decisions should not be understood to have left open the possibility that the court had some other power to intermeddle in the arbitrations at the centre whether by way of inherent jurisdiction or at common law or otherwise.

We think it useful to reproduce here what Lord Diplock said in *Bremer Vulcan v. South India* [1981] 1 LILR 253 at pp. 258 and 259:

> The supervisory jurisdiction that the High Court exercises over the way in which inferior Courts and tribunals conduct their proceedings upon which Lord Denning MR, and Lord Justice Cumming-Bruce relied as one source of its jurisdiction **to prohibit further proceedings in an arbitration is not inherent in its character as Court of Justice; it is statutory.** True it is that, in typical English fashion, the supervisory jurisdiction over inferior tribunals that is vested in the High Court by statute is that which was vested in or capable of being exercised by the superior Courts of common law, principally the court of Queen's Bench, before the Judicature Act 1873; so one must look to see over what inferior Courts or tribunals the Court of Queen's Bench did assert a supervisory jurisdiction. The procedure by which it exercised this jurisdiction until the very recent change in the Rules of the Supreme Court was by the issue of the prerogative writs (*certiorari*, prohibition, *mandamus*, etc) or the making of orders of the like nature, although there existed too at common law the confessedly anomalous jurisdiction to set aside an award of private arbitrators for errors of law upon its face: *Kent v. Elstob* [1802] 3 Ea. 18, and see *R v. Nothumberland Compensation Tribunal* [1052] 1 KB 338 per Lord Justice Denning at p. 351. **This jurisdiction, however, was not directed to controlling the procedure followed in the arbitration but was concerned only with the written award resulting from it**. So one must start by inquiring whether during the centuries-long history of English arbitration, there are any instances of the Court of Queen's Bench before 1873 or the High Court thereafter asserting a jurisdiction to control the conduct of a consensual private arbitration by the issue of prerogative writs or orders.
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> My Lords, in *Reg. v. National Joint Council for the Craft of Dental Technicians* [1953] 1 QB 704 it was stated by Lord Goddard, CJ, whose knowledge of the history of the common law was profound, that there were no such instances; and none has been drawn to the attention of the House. In that case it was held by the Divisional Court **that the general supervisory jurisdiction of the High Court over the proceedings of inferior Courts and tribunals extended only to:**
>
> > **… bodies on whom Parliament conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction. (p. 708.)**

These bodies would include arbitrators appointed to conduct a statutory arbitration to whose jurisdiction parties to a particular kind of dispute are compelled to refer it for determination, but they **do not include arbitrators appointed pursuant to private arbitration agreement**. In relation to private arbitrations the jurisdiction of the High Court to supervise the conduct of the arbitration is confined to exercising the powers conferred upon it by the Arbitration Acts 1950 and 1979 (though the latter act does not apply to the arbitration in the instant case). The reason for this distinction is that the jurisdiction of an inferior court or statutory tribunal or arbitrator over the person who wishes to resist the claim is compulsory whereas **the jurisdiction of an arbitrator over both parties to private arbitration agreement is consensual only.** As Lord Goddard, CJ, in the case that I have cited, said of such an arbitrator:

> … In one sense he is the antithesis of a court. A person goes to arbitration because he does not want to go to the court. Therefore, he sets up his own private judge to decide the case, but the arbitrator is not deciding it as a judge, he is deciding it as an arbitrator, and procedural rights and all matters relating to procedure are to be found in the Arbitration Act 1950. (Now the Arbitration Acts 1950 and 1979.)

I find myself unable to accept as well-founded the general proposition by Lord Denning MR that:

> **… the High Court has an inherent jurisdiction to supervise the conduct of arbitrators. It is not confined to statutory powers.**

That such a general supervisory power was vested in the High Court had never been asserted until the judgment of the Court of Appeal delivered in June, 1979, in the *Angelic Grace* [1980] 1 Lloyd's Rep. 288, where, although in the result it was not acted upon, the claim that it exists is to be found in the judgment of Lord Denning MR, himself. It does not appear that *Reg. v. National Joint Council for the Craft of Dental Technicians* had been cited to the court in the *Angelic Grace* and the authorities relied upon as for the proposition were statements made obiter by Lord Denning, MR's, predecessor, Sir George Jessel, MR, in two judgments at first instance delivered shortly after the passing of the Judicature Act 1873 and before the passing of the Arbitration Act 1889. These were *Malmesbury Railways Co. v. Budd* [1876] 2 Ch. D 113 and *Beddow v. Beddow* [1878] 9 Ch. D 89. Both were about the jurisdiction of the newly-created High Court to grant an injunction to restrain an arbitrator, who was disqualified by bias, from proceeding with the arbitration. I shall revert to these two cases when I come, as I shall do shortly, to consider the extent to which the statutory jurisdiction under s. 45 of the Judicature Act 1925, to grant injunctions empowers the court to intervene by injunction in the conduct of arbitrations. For the moment I confine myself to rejecting the notion that the High Court has a general supervisory power over the conduct arbitrations more extensive than those that are conferred upon it by Arbitration Acts; nor do I suppose that the assertion of such an open-ended power of intervention

> in the conduct of consensual private arbitration would be likely to encourage resort to London arbitration under contracts between foreigners which have no other connection with this country than the arbitration clause itself.

In the same case there is a reference to what an exclusion provision could achieve in the dissenting judgment of Lord Scarman where he said (at p. 270):

> Though the jurisdiction of the Courts may now be ousted in those international arbitrations where the new Act allows an exclusion agreement, it remains a vital, if no longer universal, principle of the law that the Courts will act to prevent injustice arising in arbitration proceedings where it is necessary so to do.
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> I therefore agree with my noble and learned friend, Lord Fraser of Tullybelton, and with Lord Denning, MR, that the Courts retain such a power save where excluded by statute and that parties to arbitration have a right to a fair arbitration. If the right can be protected within the arbitral process, as in most cases under the 1979 Act it will be, the Courts will not intervene; for neither justice nor convenience will require so drastic a step. **If the right be excluded by statute, as well it may be under an exclusion agreement rendered lawful by the new Act, there will no legal right for the Court to protect.**

The exclusion agreement Lord Scarman was referring to must have been s. 3(1) of the English Arbitration Act 1979 which reads:

> (3) In any case where:
>
> (a) an arbitration agreement, other than a domestic arbitration agreement, provided for disputes between the parties to be referred to arbitration, and
>
> (b) a dispute to which the agreement relates involves the question whether a party has been guilty of fraud, and
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> (c) the parties have entered into an exclusion agreement which is applicable to any award made on the reference of that dispute.
>
> then, except in so far as the exclusion agreement otherwise provides, the High Court shall not exercise its powers under s. 24(2) of the principal Act (to take steps necessary to enable the question to be determined by the High Court) in relation to that dispute.

Section 25(2) of our Act is identical to s. 24(2) of the English Arbitration Act 1950. Our attention has not been directed to any equivalent legislation to our s. 34(1) in the United Kingdom or elsewhere. Taking the plain meaning of the words we are in complete agreement with the trial judge that the effect of this section was to exclude altogether not just s. 25(2) but the entire Act and all other written law from arbitrations held under the Rules. We hold

further that in the context of the section, and as to the word "held", all we need to ask is whether there is an arbitration in existence. This would be the case as soon as the notice of arbitration is received by the party against whom the arbitration is initiated. In the result it seems fair to say that s. 34(1) of the Act is of wider application than s. 3(1) of the English Arbitration Act 1979 (see *2 Halsbury's Laws of England* (4th Edn) para 707).

With respect to Mr. Abraham we derived no assistance from passages he cited to us from *Malaysian Government Officers Co-operative Society Ltd. v. V.A.I. Ltd. & Ors.* [1972] 1 MLJ 113 and *Lai Siew Wah Sdn. Bhd. v. Ng Chai* [1988] 1 MLJ because these cases fell to be decided without recourse to an exclusive jurisdiction section like s. 34(1) of the Act.

The claim that the court had powers to intercede here by virtue of its inherent jurisdiction or at common law was based on dicta cited from *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748 and *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan* [1997] 1 CLJ 665. These decisions were irrelevant to our present purposes because they concerned the power of judicial review over the decision of the Industrial Court in the first case, and the Minister's decision pursuant to the exercise of his statutory powers in the second. In each case the jurisdiction of the Industrial Court and the Minister over the employer was (to borrow the words of Lord Diplock) "compulsory whereas the jurisdiction of an arbitrator over both parties to an arbitration agreement is consensual only."

In the absence of s. 34(1) of the Act we think it would not be correct to say that the courts can be compelled to refuse arbitration merely because one party alleges that the dispute involves a question of fraud. We have taken note of the passage in *The Law and Practice of Commercial Arbitration* (2nd Edn) by Mustill and Boyd p. 116 which reads:

> An issue of fraud is capable in principle of falling within the scope of an agreement to arbitrate. This is assumed by s. 24(2) of the 1950 Act, and was stated by Lords Wright and Porter in *Heyman v. Darwin Ltd* [1942] AC 356 at 356 and 378 and 392. (These *dicta* are, it is submitted, more in accord with principle than the contrary view expressed by Lord MacMillan, *ibid.*, at 371.) See also *Trainor v. Phoenix Fire Assurance* [1891] 65 LT 825; *Kenworthy v. Queen Insurance Co* [1892] 8 TLR 211 (cases on *'Scott v. Avery'* clause); and *May v. Mills* [1914] 30 TLR 287; whether or not it does so depends on the wording of the agreement *Heyman v. Darwins*, *supra*, at 378 and 392. See also p. 108, *ante.*

> The court has, however, a jurisdiction to order that the arbitration agreement shall cease to have effect, and may also give leave to revoke the authority of the arbitrator, so far as may be necessary to enable an issue of fraud to be determined in the High Court SS. 24(2) if the 1950 Act. See p. 50, post, and *Permavox Ltd v. Royal Exchange Assurance* [1939] 64 L1L Rep 145.

Admittedly there is a power under s. 25(2) but the court will not exercise that power merely because one party makes a bare allegation of fraud. The authorities have all been discussed by Mustill and Boyd at p. 501:

> 'Fraud' is a technical term with a precise legal meaning: namely the knowing or reckless making of a misstatement. It is far from embracing all forms of personal misconduct.

The cases on point are *Camilla Cotton v. Oil. Granadex SA and Tracomin* [1976] 2 Lloyd's Rep 10 at 16, and *Watson v. Prager* [1991] 3 All ER 487 at 510.

Had there been no s. 34(1) of the Act to come to the aid of the respondents we would still have held that this application was misconceived because there was nothing in the respondents' letters we have quoted, or in paras. 65 and 66 which amounts to any concrete or specific charge of fraud such as to come within the purview of s. 25(2) of the Act.

In the result we dismissed this appeal without calling upon the respondents to reply because at the close of the appellants' counsel's submission we had no doubts whatsoever that the judgment of the court below should not be disturbed, and awarded the respondents their costs.